

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan For Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates For Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109

COMMENTS OF COMPTTEL

April 18, 2011

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COMPTTEL, through counsel, hereby submits these comments in the above-captioned proceedings.¹

INTRODUCTION AND SUMMARY

There is no question that comprehensive universal service and intercarrier compensation reform is long overdue and COMPTTEL supports the Commission's efforts to restart the engine and implement change. The Commission, however, must act within the authority and jurisdiction that Congress has delegated to it. The Commission obviously appreciates the major

¹ These Comments reflect the position of a majority of COMPTTEL members. Individual members may be filing separate comments where they advocate positions on some issues that are different from those stated herein. Some members, including Sprint Nextel, do not join in these comments.

financial impact² that universal service and intercarrier compensation reform is going to have on carriers and it is more than likely that no matter what the Commission does, appeals will follow. Some of the Commission's proposals – *e.g.*, to use universal service funds to subsidize information services and non-telecommunications service providers -- go beyond the authority and jurisdiction that Congress has granted to the Commission. Those proposals should be rejected in favor of rule changes that will withstand judicial review and minimize regulatory uncertainty.

One recurring theme that appears throughout the NPRM is the Commission's desire to accelerate the transition to IP technology. Reforming intercarrier compensation is not going to accomplish that. The Commission must act affirmatively to safeguard the rights of requesting carriers to interconnect with one another as technology evolves by clarifying that IP-to-IP interconnection is governed by Sections 251 and 252 of the Act.

The Commission should reprioritize its proposed universal service reforms. First, it is inequitable for the Commission to continue to tap only the shrinking pool of revenues collected from voice customers to subsidize both fixed and mobile broadband. The Commission needs to expand the contribution pool to include broadband Internet access service revenues so that the beneficiaries of the subsidies bear a fair share of the cost.

Second, the Commission needs to address the flaws in the oversight, administration and management of the high cost fund before it expands the fund to cover additional services. Last month the Government Accountability Office ("GAO") issued a report to Congress in which it concluded that the Commission's proposals to modify the high cost fund to support greater

² The high cost fund disbursed \$4.3 billion to carriers in 2010 and the Commission estimates that intercarrier compensation transfers amount to approximately \$8 billion annually. Notice of Proposed Rulemaking ("NPRM") at ¶¶ 20, 494.

deployment of broadband technology without first reexamining the purpose, design and management of the program, was likely to increase disbursements from the fund and the costs borne by consumers. Over the years, the GAO repeatedly has told the Commission what it needs to do to improve the internal controls and management of the fund and increase accountability for the use of the funds, but the Commission has yet to take effective action. A failure to remedy these weaknesses before the fund is expanded to cover broadband will unfortunately ensure that the existing weaknesses and lack of accountability will continue to plague the funding of both voice and broadband.

COMPTEL also supports the Commission's proposals to cut back the universal service subsidies for high cost loop support, local switching support and interstate common line support, to cap total per line high cost support, to subsidize only one provider in unserved areas and to award any subsidies for unserved areas by competitive bidding to ensure that the most efficient provider receives the funds.

The functions carriers perform to transport and terminate traffic do not vary by jurisdiction and neither should the rates. A uniform rate for all intercarrier traffic would more closely parallel the way costs are incurred than the current access charge regime and COMPTEL supports the Commission's objective to reach parity. In order to avoid disruptions to carriers' business expectations, the Commission must allow the reduction and/or elimination of per minute charges to take place over an adequate glide path, in no event less than five years.

Carriers may voluntarily agree to bill and keep arrangements where traffic is roughly in balance and it makes economic sense, but the Commission does not have jurisdiction to force carriers into bill and keep arrangements in the absence of evidence that they incur no costs for

the transport and termination of traffic. It may be appropriate to replace per minute charges with a flat rated or capacity based compensation scheme as the industry transitions to IP technology,

COMPTEL agrees with the National Broadband Plan's recommendation that carriers must be given an opportunity for adequate cost/revenue recovery as intercarrier compensation rates are reduced. Where possible, carriers should first be required to seek recovery through increased end user rates and/or subscriber line charges. To the extent that the Commission finds that a revenue recovery mechanism is necessary to ensure that end user rates for quality services remain affordable as intercarrier compensation revenues are reduced, intercarrier compensation reductions should be timed to coincide with the availability of recovery funds to replace the lost revenues. COMPTEL supports the Commission's efforts to gather the data necessary to appropriately size the fund.

I. The Commission Must Make Clear That IP-to-IP Interconnection Is Governed By Sections 251 and 252

The Commission repeatedly asserts that the current intercarrier compensation regime creates a disincentive for carriers to deploy broadband and transition their networks from circuit-switched to Internet Protocol based ("IP") technology.³ The Commission has asked what specific actions it should take besides reforming intercarrier compensation to encourage the transition to IP technology and how IP-to-IP interconnection arrangements for the exchange of VoIP traffic fit within existing legal and technical frameworks.⁴ The most important action the Commission can take to attain its overarching goal of promoting the deployment of broadband and IP technology is to confirm in no uncertain terms that IP-to-IP interconnection is subject to Sections 251 and 252 of the Communications Act.

³ See e.g., NPRM at ¶¶6, 496, 502, 506, 527, 679.

⁴ NPRM at ¶ 679.

The network evolution from narrowband to broadband technology has been occurring for a number of years and will continue to occur. When circuit switch equipment reaches the end of its economic life, it should be replaced by soft switch technology that has the capacity to improve the economic efficiencies of network operation. As carriers transition their networks from circuit-switched to IP, the circuit-switched interconnection and traffic exchange arrangements will need to be replaced by more efficient and more economical IP-based arrangements. Individual carriers' business plans will dictate the timing of network upgrades, but the Commission should ensure that the transition is not stymied by interconnection roadblocks unilaterally established by the Regional Bell Operating Companies ("RBOCs").

The Commission states that "interconnection for circuit-switched voice traffic is governed by Section 251 of the Act."⁵ While the Commission's statement is technically accurate, nothing in the language of Section 251 limits the applicability of a carrier's statutory interconnection obligations to circuit-switched voice traffic. On the contrary, the statutory language is technology neutral and IP-to-IP interconnection arrangements for the exchange of VoIP traffic are subject to the same Section 251 requirements as circuit-switched voice interconnection arrangements. Those requirements include the obligation of incumbent local exchange carriers to negotiate interconnection agreements with requesting carriers in good faith and to provide interconnection (1) at any technically feasible point within their networks; (2) that is at least equal in quality to that provided to themselves or to any subsidiary, affiliate or any other party to which the carriers provide interconnection; and (3) on rates, terms and conditions that are just, reasonable and nondiscriminatory in accordance with the terms of Sections 251 and 252, which include the establishment of reciprocal compensation arrangements. Pursuant to

⁵ *Id.*

Section 252, carriers must also submit to arbitration before the State commissions in the event negotiations are unsuccessful and file all negotiated and arbitrated interconnection agreements with the State commissions for review and approval. Although the Commission's circuit-switched-specific existing interconnection rules may need updating, neither advances in technology nor the transition to IP should be found to alter or eliminate the interconnection rights of requesting carriers under Sections 251 and 252.

The Commission has already determined that Section 251 entitles telecommunications carriers to interconnect for the purpose of exchanging VoIP traffic with incumbent LECs and that a contrary decision would impede the development of VoIP competition and broadband deployment. *In the Matter of Time-Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, DA 07-709 (rel. Mar. 1, 2007) at ¶¶8, 13.⁶ See also, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 at ¶ 32 (rel. Aug. 7, 1998) (holding that “the obligations of sections 251 and 252 of the Act apply to advanced services and the facilities used to provide those services” and that incumbent LECs are required to provide interconnection

⁶ The fact that the *Time Warner* case dealt specifically with the rights of wholesale carriers to interconnect for the purpose of carrying other providers' VoIP traffic is irrelevant to the Commission's determination that Section 251 continues to govern the interconnection rights of telecommunications carriers. “[W]e find that the Act does not differentiate between the provision of telecommunications service on a wholesale or retail basis” for purposes of Section 251 and that “providers of wholesale telecommunications services enjoy the same rights as any ‘telecommunications carrier’” under that Section of the Act. *Time Warner Declaratory Ruling* at ¶9.

for advanced services); *id.* at ¶48 (interconnection obligations of Sections 251(a) and 251(c)(2) apply to incumbent LECs' packet-switched telecommunications networks and the telecommunications services offered over them). The Commission now needs to go a step further and declare that requesting carriers are entitled under Section 251 to interconnect with incumbents and their affiliates on an IP-to-IP basis where technically feasible.

The three largest incumbent LEC enterprises – AT&T, Verizon and CenturyLink/Qwest – all have extensive IP networks but have resisted allowing their competitors to interconnect on an IP-to-IP basis for the exchange of VoIP traffic pursuant to Section 251.⁷ In an apparent effort to shield their IP networks and SIP termination services from negotiated or arbitrated interconnection agreements with other carriers, AT&T, Verizon and CenturyLink/Qwest offer their Internet/IP services through various affiliates (AT&T Internet Services, Verizon Business, Qwest Long Distance) rather than through their regulated local exchange carrier operating companies that provide service predominantly over the public switched telephone network (“PSTN”).

Ten years ago, the D.C. Circuit vacated an order of the Commission that would have allowed an RBOC to avoid its Section 251(c) obligations by setting up a wholly owned affiliate

⁷ NPRM at n. 729. *See also*, Verizon's description of its SIP Gateway Service available at <http://www2.verizon.com/wholesale/solutions/solution/SIP%2BGateway%2BService> (“SIP Gateway Service provides origination of local and long distance calls from the PSTN to Verizon's extensive VoIP network. Termination of both local and long distance calls . . . from the Verizon VoIP network to the PSTN also leverages Verizon's expansive domestic and international TDM network.”); Qwest's description of its IP Voice 1+Termination product available at <http://www.qwest.com/wholesale/pcat/natipvoiceterm>. (“Qwest can be your single provider for both traditional long distance as well as IP Voice 1+ Termination.”); AT&T, Inc. 2010 Annual Report at 5-6 (“Our third major growth platform is AT&T U-verse, an integrated set of services – high quality TV with unique features and functionality, high speed Internet, and voice – all delivered over an advanced Internet Protocol network.”) available at <http://www.att.com/gen/investor-relations?pid=19234>.

to offer advanced services.⁸ *Association of Communications Enterprises v. FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001).⁹ The Commission should invoke that ruling here to clarify that requesting carriers are entitled to IP-to-IP interconnection where technically feasible and that Sections 251(c) and 252 govern the negotiation and arbitration of IP-to-IP interconnection agreements, just as they do the negotiation and arbitration of circuit-switched interconnection agreements, with the ILEC enterprises as a whole. Relieving requesting carriers of the necessity of converting VoIP traffic to TDM before passing it on to legacy ILEC networks will allow consumers to begin to fully realize the benefits and economies of IP voice technology and its more efficient use of bandwidth.

The Commission should also recognize that the potential for being sued for patent infringement may cause carriers to delay or defer deploying VoIP products and services. The most recent lawsuit is one filed by Bear Creek Technologies on February 22, 2011 against Verizon, Qwest, AT&T, CenturyLink, Vonage, RCN, Comcast, Cox, Charter, Time Warner Cable, Mediacom, Cablevision, BrightHouse, T-Mobile and other defendants alleging that they have infringed a patent entitled “System For Interconnecting Standard Telephony Communications Equipment To Internet Protocol Networks” that was granted on February 15, 2011 by “making, using, selling, offering for sale, operating, advertising, and/or marketing VoIP

⁸ The Communications Act defines “advanced services” as “high-speed, switched broadband telecommunications capability that enables users to originate and receive high-quality, voice, data, graphics and video telecommunications using any technology” without regard to transmission media or technology. 47 C.F.R. §1302.

⁹ “[T]he Act’s structure renders implausible the notion that a wholly owned affiliate providing telecommunications services using equipment originally owned by its ILEC parent, to customers previously served by its ILEC parent, marketed under the name of its ILEC parent should be presumed to be exempted from the [Section 251(c)] duties of that ILEC parent.” 235 F.3d at 668.

products, systems or services within the United States.”¹⁰ Regardless of the merits of the plaintiff’s claims, defending patent litigation is very expensive. At least one COMPTTEL member has delayed transitioning to soft switch technology because of the threat posed by lawsuits such as Bear Creek’s. While COMPTTEL recognizes that there is nothing the Commission can do to stem patent infringement claims filed against VoIP providers, it should acknowledge the chilling effect that the potential for such claims may have on the decisions of smaller carriers to upgrade their networks to IP.

The Commission must facilitate the transition to an all IP world by ensuring that all carriers are able to exchange traffic with one another on an IP-to-IP basis where technically feasible. In order to ensure that requesting carriers have an opportunity to negotiate just and reasonable terms for such interconnection, the Commission must remove any doubt that carriers can avoid their Section 251 and 252 obligations by offering IP services and facilities through an affiliate.

II. Interconnected VoIP Is, And Should Be Classified As, A Telecommunications Service

Inexplicably, the Commission asks yet again for comment on whether it “should consider classifying interconnected voice over Internet protocol as a telecommunications service or an information service.”¹¹ The Commission has been asking for comment on this same issue for over seven years¹² and parties have filed numerous petitions over the past 10 years beseeching

¹⁰ *Bear Creek Technologies, Inc. v. RCN Corporation, et al.*, Case No. 2:11-cv-00103-RAJ-TEM, Complaint at 8, filed February 22, 2011 in the U.S. District Court for the Eastern District of Virginia. *See also*, “VoIP patent lawsuit names several telecom carriers as defendants,” available at <http://www.fiercetelecom.com/story/voip-patent-lawsuit-names-several-telecom-carriers-defendants>.

¹¹ NPRM at ¶73.

the Commission to clarify the regulatory status of interconnected VoIP service.¹³ The Commission itself has conceded that “the regulatory uncertainty about whether or what intercarrier compensation payments are required for VoIP traffic is hindering investment in IP-based products and services.”¹⁴ So the short answer to the Commission’s question is yes, the Commission should make a decision about the regulatory classification of interconnected VoIP service. And that decision should be that interconnected VoIP, including VoIP-VoIP carrier transmission, is a telecommunications service. As the Commission acknowledges, classifying interconnected VoIP as a telecommunications service would enable the use of universal service funds to support networks providing VoIP, including broadband networks.¹⁵ The same holds true for classifying VoIP-to-VoIP transmissions between telecommunications providers as telecommunications services.

Both interconnected VoIP and VoIP-VoIP transmissions between carriers clearly meet the statutory definition of telecommunications service – “the transmission between or among points specified by the user of information of the user’s choosing without change in the form or

¹² See, *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 at ¶¶ 42-55 (rel. Mar. 10, 2004).

¹³ See, e.g., Petition of U.S. West For Declaratory Ruling Affirming Carrier’s Carrier Charges On IP Telephony (filed Apr. 5, 1999); Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt From Access Charges, WC Docket No. 02-361 (filed Oct. 2002); Petition of SBC Communications Inc. for Forbearance Under Section 10 of the Communications Act from Application of Title II Common Carrier Regulation to “IP Platform Services,” WC Docket No. 04-29 (filed Feb. 5, 2004); Feature Group IP Petition For Forbearance From Section 251(g) of the Communications Act and Sections 51.701(b) and 69.5(b) of the Commission’s Rules, WC Docket No. 07-526 (filed Oct. 23, 2007); Embarq Petition For Forbearance From Enforcement of the ESP-Exemption for IP-enabled Voice Calls Terminated To The Public Switched Telephone Network, WC Docket No. 08-08 (filed Jan. 11, 2008).

¹⁴ NPRM at ¶ 35.

¹⁵ *Id.* at ¶ 73.

content of the information as sent and received” offered for a fee directly to the public.¹⁶ The form and content of the information sent and received in a voice communication is the same whether it is delivered over a packet-switched network or a circuit-switched network. The packet switching deployed in IP networks and the circuit-switching deployed in the PSTN are just different transmission technologies used to route the telephone traffic.¹⁷ When the form and content of the information sent and received in a voice telephone call remains the same whether transmitted over an IP network or a circuit-switched network, there is no statutory justification for classifying one as a telecommunications service and one as an information service based solely on the technology of the network used to initiate or terminate the phone call.

The Commission has long classified circuit-switched voice traffic as a telecommunications service and it should do the same for packet-switched VoIP traffic. “To the extent that an advanced service does no more than transport information of the user’s choosing between or among user-specified points, without change in the form or content of the information as sent and received, it is ‘telecommunications,’ as defined by the Act” and to the extent such a service is offered for a fee directly to the public, it is a “telecommunications service.” *In the Matter of Deployment of Wireline Services Offering Advanced*

¹⁶ 47 U.S.C. §§ 153(43), 153(46).

¹⁷ See in *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 at ¶ 8 (rel. Mar. 10, 2004) (IP is a common protocol used “to transmit data across the network in a manner fundamentally different than the way in which signals transit a circuit-switched service. Whereas circuit-switched networks generally reserve dedicated resources along a path through the network, IP networks route traffic without requiring the establishment of an end-to-end path.”) On its website, Verizon defines VoIP as “[a]n industry transmission standard which supports voice communications over packet networks. . . .” See Verizon Glossary available at <http://www22.verizon.com/wholesale/glossary/?1=i>.

Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order at ¶35. See also, *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 at ¶¶ 4 (rel. Apr. 21, 2004) (“A basic service is transmission capacity for the movement of information without net change in form or content”).

In contrast, VoIP service does not meet the statutory definition of information service. The Act defines information service as a “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”¹⁸ Information services have basic service components, but also involve “some degree of data processing that changes the form or content of the transmitted information.”¹⁹ Protocol processing services, however, “that result in no net protocol conversion to the end user are classified as . . . telecommunications services.”²⁰

The fact that the shift to IP technology has been occurring over a period of time has necessitated some protocol processing to maintain compatibility with customer premises equipment. The Commission has specifically determined that such protocol processing does not

¹⁸ 47 U.S.C. § 153(20).

¹⁹ *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, at ¶ 4.

²⁰ *Id.* at ¶7 quoting *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report To Congress, 13 FCC Rcd 11501, ¶ 50 (1998) (“*Stevens Report*”); see also *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, FCC 97-52, Order on Reconsideration, 11 FCC Rcd 2297 (1997) ¶ 2 (protocol “conversions taking place solely within the carrier’s network to facilitate provision of a basic network service, that result in no net conversion to the end user” fall within the exception to the definition of information service).

fit within the definition of information service.²¹ The Commission has also previously determined that the “protocol processing that takes place incident to phone-to-phone IP telephony does not affect the service’s classification . . . because it results in no net protocol conversion to the end user.”²² The Commission should reaffirm those determinations and classify VoIP service as a telecommunications service.

The Commission also asks whether it should forbear from any of the provisions of Title II of the Communications Act should it classify VoIP as a telecommunications service. Relying on its Title I authority, the Commission already requires interconnected VoIP providers to comply with a number of Title II obligations, including the obligations to provide local number portability, 911 calling capability, disability access and Section 214 notice of discontinuance of service, the obligation to protect customer proprietary network information and the obligation to contribute to the universal service and TRS funds.²³ It would be ironic indeed for the Commission to have concluded that the public interest required interconnected VoIP providers to comply with these Title II obligations when their regulatory status was undetermined and then to forbear from enforcing these same obligations once VoIP is classified as a telecommunications service. For the reasons stated above, the Commission cannot forbear from applying Sections 251 and 252 to interconnected VoIP services and providers. Enforcement of these obligations is

²¹ *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, FCC 97-52, Order on Reconsideration, 11 FCC Rcd 2297 (1997) ¶ 2 (protocol processing in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE) does not result in a net protocol conversion).

²² *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, at ¶ 7, quoting from the *Stevens Report* at ¶ 52.

²³ NPRM at ¶73.

necessary to ensure that the charges, practices, classifications and regulations for IP-to-IP interconnection are just, reasonable and nondiscriminatory. Enforcement also remains necessary to accelerate the transition from circuit-switched to IP networks, promote competitive market conditions and enhance competition among VoIP providers.

If, for some reason the Commission decides instead to classify VoIP as an information service (which it should not), it must at the very least make clear that the broadband transmission facility that VoIP traffic rides is a segregable telecommunications service and that Sections 251 and 252 govern the interconnection rights for this segregable telecommunications service. A failure to do so may jeopardize the availability of universal service service funding for broadband networks and impair the ability of requesting carriers to realize just and reasonable terms for interconnection.

III. Universal Service Reform

In its Joint Statement on Broadband released just a year ago, the Commission stated that the “nearly \$9 billion Universal Service Fund (USF) and the intercarrier compensation (ICC) system should be comprehensively reformed to increase accountability and efficiency. . . .”²⁴ Over the past ten years, the Commission has opened numerous rulemakings and requested numerous recommendations from the Federal-State Joint Board on Universal Service with the promise of implementing comprehensive high cost universal service reform,²⁵ but

²⁴ *In the Matter of Joint Statement on Broadband*, Joint Statement on Broadband, GN Docket No. 10-66, FCC 10-42 at 2 (released Mar. 16, 2010).

²⁵ *See, e.g., In the Matter of Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking, 16 FCC Rcd 9892 (2001) (initiating examination of contribution methodology); *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC 02-307 (rel. Nov. 11, 2002) (asking the Federal-State Joint Board to review the Commission’s rules and make recommendations relating to high cost support in study areas where a CETC provides service); *In the Matter of High Cost Universal Service*

comprehensive reform has yet to be implemented. Instead, the Commission has adopted various stop gap measures to address discrete issues while avoiding any comprehensive action.²⁶

Unfortunately, the instant NPRM appears to yet be another stop gap measure. It does not even

Support, WC Docket No. 05-337, Order, FCC 06-69 (rel. May 16, 2006) (extending embedded cost rules for rural carriers on an interim basis until Commission adopts changes, if any); *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, FCC 06-94 (rel. June 27, 2006) (making interim modifications to the existing approach for assessing universal service contributions while continuing to examine more fundamental reform); *In the Matter of High Cost Universal Service Support*, WC Docket No. 05-337, Recommended Decision, FCC 07J-4 (rel. Nov. 20, 2007) (Federal-State Joint Board recommendation that the Commission address long term reform issues facing high cost support system and make fundamental revisions to structure of existing universal service mechanisms); *In the Matter of High Cost Universal Service Support*, WC Docket No. 05-337, Order, FCC 08-122 (rel. May 1, 2008) (adopting interim emergency cap on amount of high cost support available to CETCs pending comprehensive reform of universal service); *In the Matter of High Cost Universal Service Support*, WC Docket No. 05-337, Notice of Proposed Rulemaking, FCC 08-4 (rel. Jan. 29, 2008) (seeking comment on whether Commission should eliminate identical support rule and on methodologies for determining CETCs' relevant costs for universal service support); *In the Matter of High Cost Universal Service Support*, WC Docket No. 05-337, Notice of Proposed Rulemaking, FCC 08-05 (rel. Jan. 29, 2008) (seeking comment on whether the Commission should use reverse auctions to determine amount of high cost universal service support provided to carriers serving rural, insular and high cost areas); *In the Matter of High Cost Universal Service Support*, WC Docket No. 05-337, Notice of Proposed Rulemaking, FCC 08-22 (rel. Jan. 29, 2008); (seeking comment on Federal State Joint Board's Recommended Decision regarding reform of high cost universal service program); *In The Matter of High Cost Universal Service Support*, WC Docket No. 05-337, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008) (seeking comment on three different proposals for universal service reform).

²⁶ See, e.g., *In the Matter of High Cost Universal Service Support*, WC Docket No. 05-337, Report and Order and Memorandum Opinion and Order, FCC 10-44 (rel. Mar. 18, 2010) (amending rules to permit ILECs whose line counts drop below certain thresholds to receive additional local switching support); *In the Matter of High Cost Universal Service Support*, WC Docket No. 05-337, Order on Remand and Memorandum Opinion and Order, FCC 10-56 (rel. Apr. 16, 2010) (determining that existing non-rural high cost support mechanism should remain in place on remand from 2005 10th Circuit order invalidating the support mechanism); *In the Matter of High Cost Universal Service Support*, WC Docket No. 05-337, Order, FCC 08-122 (rel. May 1, 2008) (adopting interim emergency cap on amount of high cost support available to CETCs pending implementation of comprehensive high-cost universal service reform); *In the Matter of High Cost Universal Service Support*, WC Docket No. 05-337, Order, FCC 06-69 (rel. May 16, 2006) (extending embedded cost rules for rural carriers on an interim basis).

contemplate comprehensive reform, seeking comment only on further expanding the distribution of high cost universal service funds “to support fixed and mobile broadband . . . and potentially a recovery mechanism associated with ICC reform. . . ,”²⁷ while steering clear of any mention of contribution reform. While making affordable broadband service available to all Americans is a laudable goal, the Commission needs to address the inefficiencies and inequities in the current system before expanding that system. Otherwise, the existing inefficiencies and inequities will be carried over into broadband funding and recovery mechanism funding, perpetuating the potential for waste, fraud and abuse.

A. Contribution Reform Should Not Be Delayed

The Commission’s proposal to expand the distribution of high cost universal service funds while leaving the contribution mechanism undisturbed means that voice customers will continue to foot the entire bill for bringing not only voice, but also broadband, service to all people of the United States. The universal service assessment surcharge that appears on the telephone bills of voice customers was an astronomical 15.5% for the first quarter²⁸ of this year and has been set at 14.9% for the second quarter.²⁹ While acknowledging the tremendous growth in broadband Internet access revenues -- from \$13.1 billion in 2003 to \$36.7 billion in 2009 -- and the decline in traditional wireline voice telephone switched access traffic -- switched access minutes fell from 567 billion in 2000 to 316 billion in 2008³⁰ -- the Commission omits any

²⁷ NPRM at ¶ 22.

²⁸ FCC Public Notice, Proposed First Quarter 2011 Universal Service Contribution Factor, DA 10-2344 (rel. Dec. 13, 2010).

²⁹ FCC Public Notice, Proposed Second Quarter 2011 Universal Service Contribution Factor, DA 11-473 (rel. Mar. 10, 2011).

³⁰ NPRM at ¶ 8.

mention of the need to expand the contribution base to include broadband Internet access revenues. What this means is that the universal service assessment factor on the declining base of voice revenues will remain in the double digits and continue to climb for the foreseeable future as the Commission uses universal service funds collected from voice customers to subsidize both fixed and mobile broadband. The Commission's goal of minimizing the burden on consumers and households that pay for universal service³¹ should be assigned a much higher priority. Section 254(b) requires the Commission to consider not just the affordability of service for those benefited, but also the fairness of the escalating universal service assessment factor to those who must pay.³² In order to remedy the unfairness of the Commission's decisions to limit the application of the contribution factor to a declining pool of revenues, COMPTTEL urges the Commission to implement contribution reform without delay.

B. The Commission Must Remedy The Flaws In The Management Of The USF

The oversight, administration and management of the high cost fund by the Commission and USAC are in desperate need of repair. For many years, the Commission's own Inspector General has reported to Congress that the high cost fund has been a target for waste, fraud and abuse and that there is substantial room for improvement in the management of the program.³³

³¹ NPRM at ¶¶ 16, 487.

³² The Commission estimated the average per-household contribution to the universal service fund in 2010 was \$5.61 per month with \$3.03 of that allocated to the high cost fund. *Id.* at ¶ 487.

³³ FCC Office of Inspector General Semiannual Report To Congress, October 1, 2008 through March 31, 2009 at 18 (the High Cost fund is "at risk" under the Improper Payments and Information Act ("IPIA") and susceptible to significant erroneous payments); FCC Office of Inspector General Semiannual Report To Congress, April 1, 2008 through September 30, 2008 at 18 (same); FCC Office of Inspector General, The High Cost Program, Initial Statistical Analyses of Data From The 2007/2008 Compliance Attestation Examinations at 1 (Nov. 26, 2008)

The Commission's management and oversight of the fund also has been subject to significant criticism from the Government Accountability Office.³⁴ Just last month, GAO issued a report in which it concluded that the Commission's proposals to modify USF programs, including the high cost fund, "to support greater deployment of more expensive broadband technologies without reexamining the purpose, design, and management of the programs could increase disbursements from the Fund and the costs borne by consumers."³⁵ The GAO also reiterated that it had raised USF management issues with the Commission in the past and that the Commission had failed to adequately address those issues:

In February 2005, GAO raised concerns with the unusual structure that FCC established for the Fund that has caused FCC to struggle over the years with identifying the fiscal and accountability requirements that apply to the Fund. These concerns included the extent to which FCC has delegated some functions to the Universal Service Administrative Company (USAC) – the not-for-profit corporation that FCC appointed as the permanent administrator of the Fund. In response to GAO's concerns that USAC was operating and disbursing funds under less explicit federal ties than many other federal programs, FCC established a memorandum of understanding with USAC in 2007. However, concerns

(High Cost program is at risk under the IPIA and problems exist in the administration of the program); FCC Office of Inspector General Semiannual Report To Congress, April 1, 2007 through October 31, 2007 at 16 ("audits have not lessened our concerns about the possibilities for fraud, waste and abuse in the Commission's USF programs as administered by the Universal Service Administrative Corporation"); FCC Office of Inspector General Semiannual Report To Congress, October 1, 2006 through March 31, 2007 at 17 (same).

³⁴ See U.S. Government Accountability Office, "FCC Needs to Improve Performance Management and Strengthen Oversight of the High-Cost Program," GAO-08-633 at 5 (June 2008) ("While some internal control mechanisms for the high-cost program exist, these mechanisms are limited and exhibit weaknesses that, collectively hinder FCC's ability to assess the risk of noncompliance with program rules and ensure cost-effective use of program funds.") ("2008 GAO Report.")

³⁵ U.S. Government Accountability Office, Opportunities To Reduce Potential Duplication in Government Programs, Save Tax Dollars and Enhance Revenue, GAO-11-318SP (Mar. 2011) at 194.

about FCC's design and structure of the Fund remain, including the Fund being outside Congress' annual appropriations oversight process.

* * *

In its management of the Fund, FCC has not undertaken a data-driven approach to overseeing the four programs.

* * *

Finally, GAO has found that FCC lacks performance goals and measures for all four Fund programs. . . . GAO has recommended over the years that FCC establish performance goals and measures for all of the Universal Service Fund programs and FCC has generally agreed with these recommendations. However, FCC has made only partial progress toward implementing performance goals and measures in each of the four programs.

GAO's work illustrates the need for a broader rethinking of the vision, size, structure and goals of the Universal Service Funds, coupled with management improvements by FCC that will address GAO's recommendations. . . . Establishing clear performance goals and measures for the programs will allow FCC to better determine the proper amount of funding for each program, target the funding to meet the needs of the intended beneficiaries and conduct needed program evaluations. . . . Beyond GAO's previous recommendations, Congress may also wish to give the Fund increased attention since it falls outside of the annual appropriations process. These actions would help ensure stronger governmental accountability over the Fund in the future and help avoid continued cost increases for rate payers.³⁶

Consistent with the GAO's recommendations, the Commission needs to address the current management and oversight issues with its administration of the universal service fund before expanding the already bloated fund to cover additional services and intercarrier compensation revenue replacement. Congress has entrusted the Commission with guardianship of the billions of dollars USAC collects from ratepayers and distributes every year to subsidize certain providers of telecommunications services. Those ratepayers are entitled to better government accountability over the use of the funds that they are forced to contribute as a condition of subscribing to an essential service -- voice telephony.

³⁶ *Id.* at 195-196.

COMPTEL supports the Commission's proposal to require all high cost fund and CAF recipients to file annual reports on the deployment, adoption and pricing for their broadband and voice offerings, on their operating results, and on their intercarrier compensation revenues and expenses.³⁷ At the very least, the Commission needs this information from beneficiaries to make an informed assessment with respect to whether services offered in rural areas are "reasonably comparable" to services offered in urban areas and are priced at "reasonably comparable" rates.³⁸ The information is also critically necessary for the Commission to police inefficient investment and deployment and appropriately target the best and most efficient use of high cost funds. The Commission needs to conduct such an assessment before it executes any plans to expand the reach of the fund.

The Commission has asked for comment on how to strengthen its audit, certification and data validation processes.³⁹ In its 2008 Report on the high cost fund, the GAO detailed the weaknesses in the FCC's internal control mechanisms stating that the mechanisms are limited

and exhibit weaknesses that, collectively, hinder FCC's ability to assess the risk of noncompliance with program rules and ensure cost-effective use of program funds. Essentially, internal control mechanisms for the high-cost program focus on three areas: (1) carrier self-certification, (2) carrier audits, and (3) carrier data validation processes. Each of these processes has limitations. Carrier self-certification is the primary tool used to ensure that carriers use high-cost program support consistent with the program rules. Yet, the process does not have standardized requirements for achieving this objective since FCC and the states each impose different requirements. Additionally, carrier audits are the primary tool used in monitoring and overseeing carrier activities, yet these audits have been limited in number and the type of reported findings. FCC's Office of Inspector General, USAC and state regulatory commissions conduct carrier audits. But, since 2002, USAC has conducted audits of 17 carriers from a population of over 1,400 carriers. The carrier audits have yielded limited findings; according to USAC, it has been difficult to determine whether carriers are in compliance with FCC rules largely due to a lack of

³⁷ NPRM at ¶¶ 459-465.

³⁸ *See*, Section 254(b)(3).

³⁹ NPRM at ¶469.

documentation available to substantiate the carriers' information. Lastly, the carrier data validation processes, which USAC and NECA conduct, are used to ensure the reliability of financial data underlying the program. However, these validation processes focus on the completeness of data reported by carriers and do not include processes for ensuring the accuracy of these data. These weaknesses limit FCC's ability to assess the risk of noncompliance with program rules. Further, these weaknesses could contribute to excessive program expenditures. For example, *these mechanisms are limited in assessing the cost-effectiveness of carriers, the accuracy of carriers' costs and line count data, and the appropriate use of high-cost program support, each of which could contribute to excessive program expenditures.*⁴⁰

The GAO's analysis provides a roadmap of what the Commission needs to do to strengthen its audit, certification and data validation processes. The Commission should not delay correcting the identified weaknesses in its internal control mechanisms pending receipt of comments on other improvements that might be made.

One critical action that the Commission should take immediately to strengthen its audit processes, however, is to ensure that the audits are completed on a timely basis and that timely efforts are made to recover improper payments. The Commission noted in the NPRM that USAC released its final report and statistical analysis for the 2007-2008 audits of high cost program beneficiaries on December 15, 2010.⁴¹ What it did not say is that these audits covered funding year 2006. As of the date of the report, 8 of the 390 audits, involving disbursements of almost \$31 million, still had not been completed.⁴² USAC estimated the improper payments to high cost fund beneficiaries for that period to be \$113 million⁴³ which exceeds the IPIA's "at

⁴⁰ 2008 GAO Report at 5-6 (emphasis added).

⁴¹ NPRM at ¶ 472.

⁴² Universal Service Administrative Company, Final Report and Statistical Analysis of the 2007-2008 Federal Communications Commission Office of Inspector General High Cost Program Beneficiary Audits (Dec. 15, 2010) at 6.

⁴³ *Id.* at 5.

risk” dollar threshold by a factor greater than 10⁴⁴ and is more than 10 percent higher than the estimated improper payments for the prior funding year.⁴⁵ Also as of the date of the report, USAC stated that the initial statistical analyses of the 331 audits of high cost beneficiaries for funding year 2007 had not yet been released.⁴⁶ USAC stated in its 2009 Annual Report, however, that it had completed the fieldwork and preliminary reporting for those audits in 2009.⁴⁷ There is something terribly wrong with the oversight, management and administration of the universal service fund when it takes USAC four years to release reports and statistical analyses of audits of fund recipients. Because the high cost program is “at risk” for significant erroneous payments under the IPIA, the dilatory nature of the audit process and the attendant lack of public accountability is even more inexcusable.

In an apparent effort to reduce the delays in completing audits, the Commission last year tasked USAC with performing 240 IPIA audits and 100 compliance audits for the high-cost program annually.⁴⁸ In doing so, the Commission stated its expectation that “[r]esults for an entire 12 month period – which will be the basis for the annual IPIA assessment – should be

⁴⁴ The IPIA defines significant erroneous payments as annual erroneous payments in a program that exceeds 2.5 percent of the program’s annual payments and \$10 million.

⁴⁵ FCC Office of Inspector General, Semiannual Report to Congress, April 1, 2009 – September 30, 2009 at 20 (Oct. 30, 2009). *See also*, Universal Service Administrative Company, Final Report and Statistical Analysis of the 2006-2007 Federal Communications Commission Office of Inspector General High Cost Beneficiary Audits at 2 (Sept. 10, 2009) (revised estimate of erroneous payments was \$103 million).

⁴⁶ Universal Service Administrative Company, Final Report and Statistical Analysis of the 2007-2008 Federal Communications Commission Office of Inspector General High Cost Program Beneficiary Audits (Dec. 15, 2010) at 4.

⁴⁷ Universal Service Administrative Company, 2009 Annual Report at 2.

⁴⁸ NPRM at ¶470; Letter dated February 12, 2010 from Steven Van Roekel, Managing Director, FCC, to Scott Barash, Acting CEO, USAC.

available within 4 months after the period ends.”⁴⁹ If any high cost beneficiary audits were performed for funding year 2010, the results should be available this month and the Commission should make those results public, including the estimates of erroneous payments and the amount of erroneous payments that USAC has recovered. If any high cost beneficiary audits were performed for funding years 2008 and/or 2009, those results should also be made publicly available. Without this information, it is impossible to determine whether there has been any improvement in management, oversight and administration of the universal service fund.

Six years ago, in an effort to improve universal service fund management, administration and oversight, the Commission sought comment on performance measures suitable for assessing and managing the universal service program and ensuring that funds are used for their intended purposes.⁵⁰ Two years later, it reported that it did not have “sufficient data to establish goals” for the high cost fund or the administration of the fund, despite the fact that USAC had been doling out billions of dollars in high cost funds for over 10 years. Such lack of accountability is unconscionable. The Commission directed USAC in 2007 to provide certain “performance measures” which could serve as a baseline for implementing goals in the future.⁵¹ Upon review of the Commission’s “performance measures,” the GAO stated that “[t]here is a clearly established purpose for the high-cost program but FCC has not established performance goals or

⁴⁹

Id.

⁵⁰ *In the Matter of Comprehensive Review of Universal Service Fund Management, Administration and Oversight*, WC Docket No. 05-195, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 05-124 (rel. June 14, 2005).

⁵¹ *See, In the Matter of Comprehensive Review of the Universal Service Fund Management, Administration and Oversight*, WC Docket No. 05-195, Report and Order, FCC 07-150 at ¶¶55, 57 (rel. Aug. 29, 2007).

measures”⁵² and found that the Commission’s “efforts do not align with useful practices that we have identified for developing successful goals” to address “mission-critical management problems.”⁵³ Accordingly, the GAO recommended three years ago that the Commission take the following actions to strengthen the management and oversight of the high-cost program:

1. To better ensure that the high-cost program supports the purpose it is intended to fill, FCC should first clearly define the specific long-term and short-term goals of the high-cost program and subsequently develop quantifiable measures that can be used by the Congress and FCC in determining the program’s success in meeting its goals.
2. To ensure a robust internal control environment that supports performance-based management, FCC should identify areas of risk in its internal control environment and implement mechanisms that will help ensure compliance with program rules and produce cost-effective use of program funds.⁵⁴

These recommendations go to the very heart of the Commission’s responsibilities to prudently manage and administer the billions of dollars in universal service funds that are collected and distributed each year. The lack of adequate oversight of the high cost fund cannot help but foster an environment conducive to waste, fraud and abuse.

The Commission has asked for comment on four performance goals: (1) preserve and advance voice service (2) increase deployment of modern networks; (3) ensure reasonably comparable rates for broadband and voice service in high cost and urban areas and (4) limit the contribution burden on households.⁵⁵ While these are all admirable long term goals, the Commission has neglected to propose any short term goals that can be used to track progress or any performance goals whatsoever that would address “mission critical management problems”

⁵² 2008 GAO Report at 5.

⁵³ 2008 GAO Report at 28.

⁵⁴ 2008 GAO Report at 40.

⁵⁵ NPRM at ¶482.

as recommended by the GAO.⁵⁶ Those management problems include at the very least the unacceptably high level of erroneous payments to high cost fund beneficiaries, the unacceptable delays in completing audits of beneficiaries and the lack of strong internal control mechanisms that would allow an accurate assessment of carriers' costs and line count data, and inadequate oversight of carriers' need for and use of high cost support.

In considering legislation to codify universal service in the Telecommunications Act of 1996, the Senate Commerce Committee anticipated that competition and new technologies would reduce or eliminate the need for universal service.⁵⁷ Unfortunately, the opposite has happened. High cost fund spending has almost quadrupled since 1996, increasing from \$1.188 billion in 1996 to \$4.507 billion in 2010.⁵⁸ During that same period, the percentage of U.S. households subscribing to telephone service increased only slightly -- from 94.4 percent to 96 percent⁵⁹—calling into serious question the cost effectiveness of universal service spending. Consistent with the GAO's recommendations, COMPTEL urges the Commission to strengthen the management, oversight and administration of the high cost fund and to establish goals and performance measures that will facilitate an evaluation of the appropriate size of the high cost fund, whether high cost funding is being targeted to meet the needs of the intended beneficiaries and whether the program is being run efficiently and cost-effectively before increasing the size

⁵⁶ 2008 GAO Report at 29.

⁵⁷ 2008 GAO Report at 2.

⁵⁸ Federal State-Joint Board on Universal Service, *Universal Service Monitoring Report*, CC Docket No. 98-202 (rel. Dec. 10, 2010). The GAO has determined that “[t]his significant growth has raised concerns about the program’s long-term sustainability, efficiency and effectiveness, as well as the adequacy of the oversight of carriers’ need for and use of support.” 2008 GAO Report at 14.

⁵⁹ Industry Analysis and Technology Division, *Telephone Subscribership in the United States* (rel. Aug. 2010).

of the fund to cover additional services and replace intercarrier compensation revenues. Only by doing so will the Commission be able to determine whether the enormous expenditures currently being made by the high cost fund on an annual basis are actually being used for their intended purposes, whether the Commission and USAC are effectively monitoring and enforcing compliance with Commission rules and keeping erroneous payments to a minimum, whether carriers receiving high cost funds are being held strictly accountable for the use of those funds, and whether every reasonable effort is being made to recover funds whose use for an appropriate purpose is not properly documented. To do otherwise will undoubtedly increase the universal service costs that must be borne by consumers, thereby threatening the affordability of telecommunications service for a greater number of consumers.

C. Section 254 Does Not Authorize The Use Of High Cost Funds To Support Information Services

The Commission asks for comment on its legal authority under the current high cost program and the Connect America Fund to support universal access to broadband service.⁶⁰ As the Commission acknowledged, it has express authority under Section 254 to subsidize broadband services that are offered as telecommunications services.⁶¹ In addition, high cost universal service funds can certainly be used, and indeed are being used, to subsidize the deployment of broadband networks capable of providing Internet access and video services when they are also used to provide supported voice service.⁶²

⁶⁰ NPRM at ¶ 55.

⁶¹ NPRM at ¶ 60.

⁶² NPRM at ¶ 170 and n. 267 (75% of NTCA's predominantly rural members report offering broadband service); see also, 2008 GAO Report at 4, 22 (rural carriers are able to recover from the high cost fund a large portion of the cost to upgrade their networks with new technologies, which facilitate broadband service as well as basic telephone service).

The Commission may not authorize the use of high cost funds to subsidize broadband Internet access or other information services. Section 254(c) of the Act defines universal service as an evolving level of “telecommunications service.” Because the Commission has classified broadband Internet access service as an information service,⁶³ it is not a telecommunications service eligible for universal service support. As a result, the Commission cannot authorize the use of current high cost program monies to fund broadband Internet access service unless and until it reclassifies broadband Internet access as a telecommunications service or the definition of supported services is modified by Congress. The Commission cannot rely on Section 254(c) to expand the definition of services supported by the high cost fund to include information services⁶⁴ because the plain language of that section limits support to telecommunications services. In contrast, Section 254(c)(3) and 254(h)(2) authorize the Commission to designate additional services, including “information services,” as eligible for support under the schools, libraries and rural health care funding mechanisms. The absence of similar language authorizing the use of high cost funding for information services constrains the Commission’s authority to designate such services as supported by the high cost fund.

Nor can the Commission rely on Section 706 or Title I to override the language of Section 254.⁶⁵ Section 706 directs the Commission to *encourage* the deployment of advanced telecommunications capability by removing barriers to infrastructure investment and promoting competition in the telecommunications market. It does not authorize the use of universal service

⁶³ *National Cable and Telecommunications Association v. Brand X Internet, Inc.*, 545 U.S. 967 (2005); *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3rd Cir. 2007); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, FCC 07-30 (rel. Mar. 23, 2007).

⁶⁴ NPRM at ¶ 63.

⁶⁵ *Id.* at ¶¶ 66-69.

funds to support information services. The Commission does not explain how providing high cost support for information services would remove barriers to broadband infrastructure investment or promote competition in the telecommunications market. The greatest expense carriers incur is the construction and deployment of the physical network infrastructure and, as noted above, universal service funds are currently being used to fund such construction and deployment. In contrast, there is no language in Section 706 sanctioning the use of universal service funds to subsidize the provision of the information services that ride on the network. Moreover, Section 706 does not authorize the Commission to create a separate fund to support information services because universal service support is not available.⁶⁶

Title I does not give the Commission authority to use high cost funds to subsidize information services because such subsidization is not reasonably ancillary to the Commission's statutory responsibilities under Section 254(b). The Commission may exercise its Title I authority only where it can demonstrate that its action is reasonably ancillary to the effective performance of its statutorily mandated responsibilities. *Comcast Corporation v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010). Section 254(b) does not serve that purpose. As the Fifth Circuit found, "section 254(b) identifies seven principles the FCC should consider in developing its [universal service] policies; *it hardly constitutes a series of specific statutory commands.*" (Emphasis added.) In addition, as noted above, Section 254(c) precludes the use of high cost universal service funds to support information services. Section 254(b) may not be read to give the Commission authority to rescind that provision. *See Texas Office of Public Utility Counsel*, 183 F.3d 393, 421 (Section 254(b) is not a grant of plenary power overriding other portions of the Act).

⁶⁶ *Id.* at ¶ 67.

The Commission asks whether it can avoid the restrictions on the use of high cost universal service funds by forbearing from section 254(c)(1), which defines universal service as a telecommunications service, and Sections 254(e) and 214(e), which restrict recipients of high cost funds to eligible telecommunications carriers. The Commission does not explain how forbearing from those sections would satisfy any of the criteria of Section 10 of the Act, 47 U.S.C. §160. If the Commission were to forbear from enforcing these provisions in order to use universal service funds to subsidize information services and non-telecommunications carriers, the size of the fund could not help but increase, which would result in an increase in the assessment factor and therefore an increase in end user rates. Such rate increases would not benefit consumers or be consistent with the criteria of Section 10.

The Commission also asks whether it can provide high cost support to information service providers.⁶⁷ The Commission does not define what it means by “information service providers,” but COMPTTEL assumes that the question refers to providers that are not also telecommunications carriers. And the answer is no. Section 254(e) provides that only an “eligible telecommunications carrier designated under section 214(e)” may receive universal service support and Section 214(e) authorizes this Commission and State commissions to designate only common carriers as eligible telecommunications carriers. Information service providers that are not telecommunications carriers do not qualify. In order to ensure that all Americans have access to voice telephone and broadband service, the Commission needs to fund network infrastructure, not ISPs. Moreover, the Commission cannot possibly legally justify providing high cost support to ISPs that are not telecommunications carriers in direct

⁶⁷ *Id.* ¶ 62.

contravention of Sections 254 and 214, and at the same time eliminate such support for competitive eligible telecommunications carriers⁶⁸ that are statutorily authorized to receive it.⁶⁹

The Commission asks whether it should redirect the high cost support that is now going to competitive ETCs to the Connect America Fund for fixed and mobile broadband service or “use such funding to reduce the size of the Fund.”⁷⁰ The Commission must resolve the jurisdictional issues before it moves forward with its proposal to create the Connect America Fund and use high cost universal service funds to subsidize broadband Internet access service or any other information service. Once those funds are spent, they will not be recoverable. The Commission’s responsibility as steward of the billions of dollars in high cost funds that are collected from rate payers includes the very serious obligation not to authorize use of the funds to subsidize services or providers other than those the statute authorizes.

D. Trimming Reimbursable Expenses

No matter how the Commission resolves the jurisdictional issues, it should take action to cut the size of the high cost fund. COMPTTEL supports the Commission’s proposals to cut back the universal service subsidies for high cost loop support, local switching support and interstate common line support and to cap total per line high cost support.⁷¹ As the Commission accurately describes, the way these subsidies are distributed under the current rules is not always

⁶⁸ *Id.* at ¶¶ 242-260. The Commission proposes to phase out high cost funding for competitive ETCs over five years and redirect those moneys to the Connect America Fund to support fixed and mobile broadband.

⁶⁹ Section 214(e) provides that State Commissions and the FCC “shall” upon request “designate more than one common carrier as an eligible telecommunications carrier for a service area.”

⁷⁰ NPRM at ¶ 249.

⁷¹ NPRM at ¶¶ 157, *et seq.*

equitable, provides some carriers far more support than necessary to ensure reasonably comparable voice services at reasonably comparable rates, provides little incentive for carriers to operate efficiently and often subsidizes the deployment of broadband networks in areas where an unsubsidized competitor is providing broadband service.⁷² Subsidizing inefficient investment and network deployment is not consistent with the purposes of the fund.

E. Establishing A Competitive Process For Funding

The Commission asks for comment on awarding targeted non-recurring funding to support the deployment of fixed or mobile broadband networks in unserved areas through competitive bidding or reverse auctions.⁷³ COMPTTEL agrees that only one provider per unserved area should be funded and that using a competitive bidding process to select that provider would help ensure that the funding would go to the most efficient provider.

COMPTTEL submits that incumbent carriers should not be given a right of first refusal to provide both voice and broadband in unserved areas.⁷⁴ An incumbent LEC that has not used existing high cost subsidies to deploy broadband in any unserved areas of its serving territory should not be given a leg up where there are competitive bidders willing to enter the market. The incumbent should be permitted to submit a bid and compete for the targeted universal service funding with all other carriers willing to serve the market. The competitive bidding process will ensure that the most efficient provider is the one that receives the subsidy and thereby facilitate the most cost-effective use of the funds. End users should not be forced to subsidize less efficient providers just because they are incumbents.

⁷² NPRM at ¶¶ 171-178.

⁷³ NPRM at ¶¶ 261-265.

⁷⁴ *Id.* at ¶431.

IV. Intercarrier Compensation Reform

The Commission asks for comment on two separate approaches to reducing per minute charges. Under the first approach, the Commission would assert jurisdiction over all traffic – interstate access, intrastate access, local, wireless – pursuant to Section 251(b)(5) and would establish a reciprocal compensation methodology for pricing the traffic that would be applied by the state commissions to set actual rates pursuant to Section 252(d). Under the second approach, the Commission would maintain the existing separate federal/state access charge regimes and set a different methodology for traffic subject to reciprocal compensation.⁷⁵ As the Commission acknowledges, there are advantages and disadvantages to each approach.

A. There Should Be A Single Uniform Rate For All Intercarrier Compensation

As the industry and technology evolve, the local, intrastate and interstate jurisdictional distinctions between telephone traffic make it increasingly difficult for carriers to bill accurately. At one time, the industry could rely on telephone numbers to determine the geographic origination and termination points of a telephone call. That is no longer the case. To use just one example, because a wireless device may be used anywhere in the country, the device's area code will not necessarily accurately pinpoint the geographic location from which a call is made or to which a call is terminated. The same is true for nomadic VoIP. Moreover, although carriers perform similar functions when terminating local, intrastate or interstate traffic and the cost to perform those functions does not vary significantly, if at all, by jurisdiction, the per minute rates that carriers are permitted to charge do vary significantly by jurisdiction. A compensation system that perpetuates these artificial geographic and financial distinctions for traffic exchanged by carriers is increasingly less reflective of actual traffic and maintaining such

⁷⁵ NPRM at ¶ 512.

a system makes no sense in the modern environment. COMPTEL supports the Commission's goal to move to a cost-based uniform rate for all traffic.

There will undoubtedly be disagreements about the path the Commission should follow to get to a uniform rate for all traffic, but whether it asserts jurisdiction over all traffic under Section 251(b)(5) or leaves to the states the responsibility for reforming intrastate access rates, states will have to be active participants in the process. *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 384 (1999); Section 252(d)(2). To the extent the Commission relies on the states to reduce their own intrastate access rates,⁷⁶ it likely will have to provide incentives to encourage the states that have not yet done so to implement reform.

B. Setting A Pricing Methodology

1. Bill and Keep

The Commission asks for comment on adopting a bill and keep methodology for intercarrier traffic pursuant to which carriers would not charge one another to recover the costs of originating or terminating calls or transporting calls from an interconnection point on the network. The costs would instead be recovered directly from end users.⁷⁷ Carriers have every incentive to enter into bill and keep arrangements with one another where it makes economic sense and the traffic being exchanged is roughly in balance. Carriers are free to voluntarily negotiate and agree to such arrangements. The Commission, however, is without statutory authority to set an intercarrier compensation rate of \$0. See 47 U.S.C. §252(d)(B)(i). And the

⁷⁶ A number of states have already taken action to bring intrastate access rates into parity with interstate rates. See *AT&T Ex Parte* dated October 25, 2010 filed in CC Docket Nos. 01-92, *et al.* at Attachments 1 and 2.

⁷⁷ NPRM at ¶ 530.

Commission's rules provide that states may impose bill and keep arrangements only in circumstances where traffic is roughly in balance.⁷⁸

Congress assigned State commissions, not this Commission, the responsibility to set actual rates for the transport and termination of Section 251(b)(5) traffic. See Sections 252(c) and 252(d). The Supreme Court has interpreted the statute to mean that while the Commission has jurisdiction to establish a pricing methodology, it is the states that must apply the pricing standards of Section 252(d)(2) and implement the Commission's methodology to set actual rates. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 384-385 (1999). Bill and keep is not a pricing methodology. It is a transport and termination rate of \$0, which the Commission is without authority to impose on carriers under the Telecommunications Act and the Commission's own rules.

In addition, Section 252(d)(2) provides that State commissions may not find that terms and conditions for reciprocal compensation are just and reasonable unless they provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." The Commission cites no data that would support the conclusion that carriers incur no costs associated with the transport and termination of other carriers' traffic.

2. Flat-Rated Intercarrier Charges

The Commission asks for comment on converting per minute intercarrier compensation charges to flat-rated charges.⁷⁹ If and when the Bell Operating Companies allow competitive

⁷⁸ Section 51.713 of the Commission's rules, 47 C.F.R. § 51.713; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 at ¶¶ 1111-1113 (1996), *vacated in part on other grounds sub nom. Competitive Telecommunications Ass'n. v. FCC*, 117 F.3d 1068 (8th Cir. 1997).

carriers to interconnect on an IP-to-IP basis, flat-rated or capacity based charges may be a cost efficient way for carriers to transport and terminate one another's traffic. The largest incumbents are not likely to allow IP-to-IP interconnection, however, unless and until the Commission makes clear that competitive carriers are entitled to such interconnection pursuant to Sections 251 and 252. As long as the RBOCs continue to force other carriers to convert IP-originated traffic to TDM and to terminate that traffic on their hierarchical PSTN networks, merely substituting a flat-rated intercarrier compensation regime for a per minute system is not going to accelerate the deployment of IP networks or speed the transition away from the circuit-switched PSTN.

Consistent with Sections 251 and 252 and the Commission's rules and orders, the Commission should design a pricing methodology using TELRIC principles to develop capacity-based compensation rates and let the State commissions apply that methodology to set the actual rates where parties are unable to agree. *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 384 (1999).

C. Transitioning Away From Per Minute Rates

COMPTTEL is pleased that the Commission appropriately recognizes the need for a glide path to ease the transition away from per minute intercarrier compensation charges.⁸⁰ Any rate reductions should be phased in gradually over at least a five year period so that carriers have sufficient time to make the appropriate changes to their business, financial and forecasting systems without the undue sticker shock that would result from a flash cut or shorter glide path.

⁷⁹ NPRM at ¶ 531.

⁸⁰ See, e.g., NPRM at ¶¶ 12, 17, 24, 41.

D. Developing a Recovery Mechanism

The Commission asks for comment on how to structure a recovery mechanism that would compensate carriers for reduced intercarrier compensation revenues.⁸¹ COMPTEL agrees with the recommendation in the National Broadband Plan that carriers must be given an opportunity for adequate cost/revenue recovery as intercarrier compensation rates are reduced.⁸² Where possible, carriers should first be required to seek recovery through increased end user rates and/or subscriber line charges. To the extent that the Commission finds that a revenue recovery mechanism is necessary to ensure that end user rates for quality services remain affordable as intercarrier compensation revenues are reduced, intercarrier compensation reductions should be timed to coincide with the availability of recovery funds to replace the lost revenues.

COMPTEL applauds the Commission's efforts to gather the data necessary to analyze existing revenues, assess the magnitude of the revenue reductions resulting from intercarrier compensation reform and determine the appropriate size and scope of the recovery mechanism.⁸³ The savings carriers realize from paying reduced intercarrier compensation charges must be netted against any revenues they forego in the collection of such charges.⁸⁴ The size of the fund should be limited to the amount necessary to keep end user rates affordable and to maintain

⁸¹ NPRM at ¶¶ 559 -572.

⁸² National Broadband Plan at 148.

⁸³ NPRM at ¶572.

⁸⁴ NPRM at ¶567. The Commission notes that NECA submitted data estimating that if NECA companies reduced their intrastate access rates to interstate levels, they would "lose approximately \$361 million in annual intercarrier compensation revenues." NPRM at ¶ 545. This estimate of revenue losses does not appear to have taken into consideration the savings the carriers would realize from paying lower intercarrier compensation rates. The savings and losses must be netted out before determining what revenue recovery a carrier may be entitled to in order to avoid having the revenue recovery mechanism turn into a windfall.

comparability between rates in urban and rural areas. Affordability may be judged against a state or federal benchmark rate.

The Commission asks for comment on which providers should be eligible for recovery from the fund and which should not.⁸⁵ No carriers that are required to reduce and/or eliminate their intercarrier compensation rates should be categorically excluded from drawing from the fund, including competitive carriers. All carriers are going to take a financial hit as intercarrier compensation revenues are reduced and/or eliminated. For the Commission to require all carriers to contribute to a revenue recovery fund, but only allow incumbents to be compensated from such a fund would put the competitive carriers with whom the incumbents vie for customers at a severe competitive and financial disadvantage and would be inconsistent with the Act. “The FCC must see to it that *both* universal service and local competition are realized; one cannot be sacrificed in favor of the other” and all market participants must be treated equally. *Alenco Communications, Inc. v. FCC*, 201 F. 3d 608, 615-616 (5th Cir. 2000) (emphasis in the original).

To force all carriers to give up the intercarrier compensation revenue stream and reimburse only one set of market participants for the revenue losses would not be equitable or nondiscriminatory. “The purpose of universal service is to benefit the customer, not the carrier,” *id.* at 621, but such a one-sided recovery mechanism would benefit carriers, not customers, and discourage customers from exploring competitive alternatives due to the higher price tag. The State of Michigan adopted legislation in 2009 that created such a one-sided revenue replacement

⁸⁵ NPRM at ¶587.

fund, which the Commission has been asked to preempt.⁸⁶ Under the Michigan law, carriers are required to reduce their intrastate access rates to interstate levels.⁸⁷ The legislation also created a rate restructuring fund to provide monthly disbursements to incumbent carriers “to recover the lost intrastate switched toll access service revenues resulting from” the rate reductions. All carriers must contribute to the fund, but only incumbents are entitled to receive disbursements to offset their lost access revenues. The average monthly per line disbursement is \$7.33, but at least one incumbent receives more than \$20 per line per month.⁸⁸ Such a government sanctioned price advantage made available only to incumbents cannot help but discourage entry and encourage end users to purchase service from the incumbents at the expense of competitors. Accordingly, if the Commission uses universal service funds to replace lost intercarrier compensation revenues, the rate recovery must be available to all carriers and must be administered in a competitively neutral manner.

⁸⁶ *In the Matter of ACD Telecom, Inc., Joint Petition For Expedited Declaratory Ruling that the State of Michigan’s Statute 2009 PA 182 is Preempted Under Sections 253 and 254 of the Communications Act*, WC Docket No. 10-45 filed February 9, 2010.

⁸⁷ MCL §484.2310.

⁸⁸ Michigan Public Service Commission, *In the Matter on the Commission’s own motion to implement 2009 PA182, MCL 484.2310*, Case No. U-16183, Opinion and Order at 4 (Aug. 10, 2010), attached as Exhibit E to the *Ex Parte* submission of ACD Telecom, et al, filed August 30, 2010 in WC Docket No. 10-45.

CONCLUSION

COMPTEL urges the Commission to implement universal service and intercarrier compensation reform in a manner consistent with the foregoing recommendations and to avoid exceeding the jurisdiction and authority that Congress has delegated to it.

Respectfully submitted,

/s/

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